explicit language to express the intention where the gift of a joint estate was the object," where are the words equally "as clear and decisive" in the "subsequent clause," to destroy the joint estate before given?

Before this opinion was rendered but few lawyers would have felt serious hesitation in passing on a title with such a devise in it, but there are few who would be bold enough to do so after this *obiter dictum* from such an eminent and distinguished jurist, and one who so justly enjoys the esteem and admiration of the bar of the State for his knowledge of the law, as well as for the grace and precision with which he propounds it. I have not been led to write this article because I am counsel in any case involving the construction of such a clause, but merely because, on reading the principal case, I was struck with the fact that the reasons upon which it was based did away with a rule of construction which I before regarded as well settled and easily followed, and substituted in its place one which will give room to great differences of opinion on the part of lawyers and judges, and must, therefore, result in much litigation.

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UNANIMITY OF JURY VERDICTS IN CIVIL CASES IN VIRGINIA.

The July number of the LAW REGISTER contained an interesting and instructive article by Mr. B. B. Lindsey on the "Unanimity of Jury Verdicts." His position—that a unanimous verdict of a jury should not be required in civil cases—is clearly and forcibly stated. It is not, however, the purpose of this paper to discuss the subject along the line of that article, but to present some reasons why the legislature of Virginia can change the unanimity rule without infringing upon the constitution.

The general impression seems to be that such a change cannot be made without first amending the constitution, and the esteemed editor of the REGISTER seems to "wink" that way in his editorial on the article above referred to.

Trial by jury, in some form, has been the mode of trying controversies between man and man for so many years that it is well nigh

impossible to trace it to its origin. At common law all, or almost all, civil cases, regardless of the amount involved, were submitted to a jury.

By section 2 of the Code of Virginia, the common law is still in force in this State, except wherein it is in conflict with the constitution, or has been changed by statute. The common law mode of trial by jury, then, is still in force in Virginia, except where it has been changed by statute.

The question, then, presented is, to what extent can the legislature change the mode of trial by jury without infringing upon either the Constitution of the United States or the Constitution of Virginia?

The VIIth Amendment to the Constitution of the United States provides:

"In suits at common law, where the amount in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved. . . . ."

If this clause applied to the States, it would effectually bar any efforts of State legislatures to change or modify trial by jury, unless and until the clause is amended, for it must be noticed that the language is mandatory—"the right of trial by jury *shall* be preserved." But this clause does not interfere in any way with the powers of the States to change the jury system. And any legislation by the States —with reference to jury trials—would not be in conflict therewith.

"The provision of the United States Constitution for a jury trial in suits at common law does not apply to State courts." *Walker* v. *Sauvinet*, 92 U. S. 90; *Edwards* v. *Elliot*, 21 Wall. 532; *Hall* v. *Armstrong* (Vt). 20 L. R. A. 366.

And Mr. Cooley in his work on Constitutional Limitations, in speaking of the VIth and VIIth Amendments to the Constitution of the United States, says:

"But as they do not mention the States, they are not to be understood as restraining their powers; and the States may, if they choose, provide for the trial of all offences against the States, as well as for the trial of civil cases in the State courts, without the intervention of a jury or by some different jury from that known to the common law." Cooley's Const. Lim. (6th ed.) 29.

The Supreme Court of Virginia, in *James* v. *Stokes*, 87 Va. 225, appears to have held the contrary, and to have applied the VIIth Amendment to the United States Constitution to jury trials in the State courts, but it is submitted, with great deference, that, if such be the effect of that decision, it is against the weight of authority and would probably be overruled should the question again be presented.* This involves the

*[The Virginia court distinctly decided otherwise in *Brown* v. *Epps*, 91 Va. 726.—EDITOR VIRGINIA LAW REGISTER.]

construction of the Federal Constitution, and it is the province of the Federal courts to construe it. This they have done, holding that the first ten Amendments to the Constitution of the United States were prepared and ratified as a Bill of Rights to restrain the Federal government, and, therefore, do not apply to the States. Journal Fed. Con. 466; *Eilenbecker* v. *Dist. Court*, 134 U. S. 801; *Ex parte Spies*, 123 U. S. 80, and cases *supra*.

So then, unless the Constitution of Virginia prohibits, the legislature has the power to change the present system of trial by jury and pass an act allowing a majority, or three-fourths, of the jury to render a verdict. Does the constitution prohibit such legislation?

Art. 1, sec. 13, of the Constitution provides:

"That in controversies respecting property, and in suits between man and man, the trial by jury is preferable to any other, and ought to be held sacred."

There is nothing mandatory in this provision, nor even directory. Read in its true light, it simply means that the framers of the constitution preferred the jury trial, as it obtained at common law, and recommended that it be retained. If it was intended to be mandatory, prohibitory and inviolable—that the legislature could not make changes respecting jury trials without doing violence to this clause of the constitution—it would have stated that "trial by jury *shall* be preserved" and *shall* "be held sacred" and *inviolate*, without whose unanimous consent a verdict cannot be rendered. But instead of so expressing it, it simply expresses a preference, and leaves it to the will of the law-making power of the State to change it whenever it is thought best.

This clause of the constitution is as it stood in the first Constitution of Virginia, except that in the first constitution the word "ancient" was inserted before the word "trial." The constitution adopted in 1852 added the words "of twelve men" after the word "jury," making the clause read "trial by jury of twelve men." But when the present constitution was adopted, the words "of twelve men" were stricken out, leaving the clause as it originally stood.

The reason why the words "of twelve men" were stricken out is largely conjecture. But it seems to bear out the idea that it was done in order to allow the legislature to reduce the number of jurors from twelve. Otherwise, the words "of twelve men" would have been retained. If, then, these words were stricken out in order to give the legislature power to change the number of jurors and still preserve a jury trial, is it not equally true that the legislature has power, under

the same clause of the constitution, to provide that three-fourths of a jury shall be allowed to render a verdict, and still the trial by jury be preserved and held sacred?

That the law-making power has power to change the jury trial in civil cases is strengthened by an examination of sec. 10 of Art. 1 of the constitution—in criminal matters. This section provides that:

"A man has a right to demand . . . . a speedy trial by an impartial jury . . . . without whose unanimous consent he cannot be found guilty."

The provisions of this clause are mandatory and must be obeyed. There *must* be a *jury trial* and the verdict of the jury *must* be *unanimous*. Contrast this clause with sec. 13, Art. 1, in civil cases, and note the difference.

Both of these clauses were adopted at the same time, and if they were intended to mean the same thing—that there must be a unanimous verdict in civil cases, as well as in criminal, with no power in the legislature to change it—why say in the one case that trial by jury is *preferable* and *ought* to be *preserved*, and in the other *has* a *right* to *demand* a trial by a jury without whose *unanimous* verdict, etc? It would have been just as easy to have put the unanimous clause in the one as in the other. As this was not done, it seems to follow that more latitude was intended to be given to the legislature in civil cases than in criminal.

In *James* v. *Stokes* (*supra*) the Supreme Court of Virginia alluded to sec. 13 of Art. 1 of the Constitution, but it did not pass upon the question as to whether or not the legislature has power to change the jury system. And the effect is simply to show that the legislature has not sought in any way to modify trial by jury. It was not necessary to a decision of the case. The constitutional question was not raised. The opinion, then, is not authority against the position herein contended for.

Some of the States have held, under their constitutions, that the legislature had no power to change the mode of trial by jury. But, from the examination the writer has been able to make, the language of those constitutions is contained in such clauses as "The trial by jury shall forever remain inviolate" (Const. of Fla.), and other like expressions, while the Virginia Constitution says that it is "preferable." If the Virginia Constitution contained a clause similar to that of Florida and other States with like clauses, then the legislature would be powerless, but as it does not, the decisions in those States would not be authority in Virginia.

There is nothing prohibitory in this clause of the Virginia Constitution. The legislature can do all things not prohibited by the constitution.

"The Constitution of Virginia is a restraining instrument, and the legislature or the State possess all legislative powers not prohibited by the constitution." *Brown* v. *Epps*, 91 Va. 726.

It would follow, therefore, that a legislative act allowing three-fourths of a jury to render a verdict in civil cases would not violate either the letter or the spirit of the constitution.

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